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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 574

In the Matter of RAY SIMON, Individually and RAY SIMON OPTICAL CO., etc., et al., Bankrupt,

ROSCOE BIFOCAL CO., INC., a corporation,
Petitioner,

vs.

RAY SIMON, Individually and as General Partner of RAY SIMON OPTICAL CO.,
Respondent.

Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit

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To the Honorable the Justices of the Supreme Court of the United States:

The undersigned prays that a writ of certiorari may issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered November 18, 1954, in the above entitled case, docketed as No. 11166.

OPINIONS BELOW.

The opinion of the Appeals Court has not been officially published. A copy of the same as issued October 1, 1954, is appended to the transcript of record (hereinafter designated by "Tr."). The referee's order dismissing Amended Specifications I (a) and I (b) as of March 31, appears on pp. 95 to 100 of the transcript. The unpublished Memorandum Order of the District Court is on p. 106 of the transcript.

JURISDICTION.

The judgment of the Court of Appeals was entered October 1, 1954; a petition for rehearing was duly filed, and was denied November 18, 1954. The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Sec. 2101 (c).

QUESTION PRESENTED.

1. Is not denial of the Bankrupt's discharge mandatory under Sec. 14 c (7) of the Bankruptcy Act where he fails to meet the burden of proof, once the Objector has made a *prima facie* showing under the proviso of that section?[1]

2. Did Congress intend that a bankrupt's explanation of losses or deficiencies of assets should be held to be satisfactory if based only on vague generalizations and estimates,[2] or, on inconsistent, contradictory and incredible

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[1] **Federal Provision Co. Inc., v. Ershowsky (C.C.A. 2, 1938) 94 F. (2) 574, 575; Sec. 14 c (7) of Bankruptcy Act.**

[2] **Federal Provision Co. Inc., v. Ershowsky (C.C.A. 2, 1938) 94 F. (2d) 574, 575; In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 260, 261; Brenner v. Gaunce (C. C. A. 9, 1928) 28 F. (2d) 606.**

testimony,[3] or on testimony that disclosed suspicious circumstances calling for further explanations which were not forthcoming?[4]

STATUTE INVOLVED.

Section 14 c (7) of the Bankruptcy Act (Amendment of 1926), Title 11 U.S.C.A. Sec. 32 c (7), reads:

> "The court shall grant the discharge unless satisfied that the bankrupt has . . . (7) failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

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[3] **Knetzer v. Larkin (U.S.C.A. 2, 1949) 178 F. (2) 532, 534; In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 260, 261.**

[4] **Shapiro & Ornish (D.C. Tex. 1929) 37 F. (2d) 403, 406,** last paragraph on page; affirmed by Circuit Court of Appeals, 5th Circuit, 37 F. (2d) 407.

STATEMENT OF THE CASE.

Ray Simon filed voluntary petitions in bankruptcy for himself individually and Ray Simon Optical Co., his partnership, on August 6, 1952 (Tr. 1). Since the question of discharge concerns only Ray Simon he will be referred to as "the bankrupt". An order was duly entered adjudging Simon and the partnership bankrupts (a certified copy of the order of adjudication is attached to Exhibit Volume and will be made a part of Record on stipulation or motion filed herewith if the writ is granted). The bankruptcy schedules list unsecured debts in excess of $110,000 most of which as having accrued in the 8¼ months' period prior to bankruptcy (Exhibit Vol. pp. 3-13). Schedule B-2 lists the "Stock in trade" as of the day of bankruptcy as valued at $80,000 (Exhibit Vol. 14). However, the "Statement of Affairs" (Exhibit Vol. p. 15) in paragraph 4 admits that no inventory was taken at the time of bankruptcy.[5] So that the $80,000 entry itself in the bankruptcy schedule would seem to be of no evidentiary value. On the other hand, the "Ray Simon Optical Company Balance Sheet" of August 6 (Tr. 24), (the day of the bankruptcy), contains what purports to be an ordinary business entry, "Merchandise Inventory (Estimated Value) $30,000."

Appellant's Amended Specifications (hereinafter designated "Specifications") of Objections I (a), I (b) and I (c) (Tr. 12-15) each called upon the bankrupt to explain satisfactorily his losses and deficiency of assets to meet his liabilities under Section 14 c (7) of the Bankruptcy Act. The first two specifications were based factually upon the

[5] Paragraph "4" of the "Statement of Affairs" (Exhibit Vol. p. 15) states that the "last inventory" was taken November 1, 1951, at which time the closing inventory was $80,030.38.

1951 Income Tax Return (Exhibit Volume, pp. 1, 2) and the "Ray Simon Optical Company Balance Sheet" of August 6, 1952 (Tr. 24). I (a) charged a shrinkage, or decrease, of over $50,000, in merchandise in 8¼ months. I (b) charged losses of over $60,000 in the same period. Each called for a satisfactory explanation.

Appellant-objector, to make a *prima facie* showing under the proviso of Section 14 c (7) of the Act, introduced these two records, the Income Tax Return for 1951 showing an opening inventory of $80,030.38 as of Nov. 30, 1951 (Exhibit Vol. p. 1), and the "Ray Simon Optical Co. Ballance Sheet of August 6th, 1952" showing a closing inventory of $30,000.00 (Tr. 24). The bankrupt relied wholly on Rudolph Weinberg, the accountant, employed prior to bankruptcy by the partnership, to make the "explanation" required by the Act. Mr. Weinberg testified that he prepared this balance sheet, not for the bankrupt, but for Mr. Murphy, the receiver in bankruptcy (Tr. 22, 56, 57), and that, in it, the entry $30,000.00 "estimated value" of the merchandise as of the day of bankruptcy represented only one-half the cost value of the merchandise (because, he said, the concern was in bankruptcy) less the $10,000.00 of "worthless inventory."

However, aside from serious doubt arising from the fact that Mr. Weinberg admitted in his testimony that this balance sheet had been prepared "in the last week of July or the first week in August" (Tr. 57) which was actually before the receiver was appointed, and longer still before August 13th, when he says he was employed by the receiver (Tr. 22), the following documentary evidence clearly discredits Weinberg's contention that the receiver ever employed him to prepare this balance sheet. The very first item of the balance sheet (as of the day of bankruptcy) is "Cash on Hand, $3,400.00" (Tr. 24). Referring

to bankruptcy Schedule B-2, (Exhibit Volume, p. 14) the first item is "Cash on Hand . . . None." Now referring to the "Receiver's First and Final Account" (contained in the certified Record in the Court below, which will be sent up if the Writ is allowed) we find that although the Receiver's Account was filed several months after bankruptcy, the receiver, had not collected this "Cash-on-Hand" item of $3,400.00. This omission from the Receiver's Account indicates that the receiver had relied on the false entry in the bankruptcy schedule which listed no "Cash-on-Hand", and that he had never even seen the balance sheet, and, of course, had never employed Weinberg to prepare it.[6]

Specification I (c) (Tr. 15) alleged that Ray Simon had admitted shortly after bankruptcy that he owned a one-third interest in Opticon Corporation, which was organized after bankruptcy, and it called upon him to explain satisfactorily that he had used none of the partnership assets to acquire that interest. This specification was stricken on motion of the bankrupt four days before the hearing on objections, (Tr. 25) and the review was taken of this order as well as of the order dismissing Specifications I (a) and I (b). However, at the hearing on the question of discharge, Nathan Scalen (Tr. 69, 70) testified the bankrupt had admitted to him, that he Simon, and two others had "bought out Ray Simon Optical Co." (Tr. 70) and that he, Simon, owned a third interest in Opticon.

The referee recognized that Scalen's testimony made the required showing under the proviso of Sec. 14 c (7), of the Act, and rejected the bankrupt's motion to dismiss

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[6] These contradictory entries were not discovered until after briefs were filed in the Appeals Court, and have not been brought to the attention of the Referee or the District Judge.

all objections at the close of Appellant's case, stating that an explanation should be made as to whether the bankrupt owned a substantial interest in Opticon, and "if so, how he acquired that interest." (Tr. 84).

The bankrupt, in his testimony, while denying generally that he had any interest in Opticon aside from being employed as a traveling salesman at $125 per week (Tr. 85), admitted that his wife, Sadie, had borrowed $3,600.00 on $52,000.00 of life insurance, which he said he had assigned to her when it was first taken out (Tr. 88, 89). These policies were not listed in his individual bankruptcy Schedule D-3-b (Tr. 91, and Exhibit Vol. p. 16).[7] The bankrupt assets were purchased in the name of Herman Silver, a certified public accountant (Tr. 88, 5), who was said to have advanced $15,000, of the $22,250.00 purchase price (Tr. 88). No documents evidencing the insurance, the assignments, the loan, or any corporate records of Opticon, were offered in evidence to corroborate his testimony.

The referee, at the close of the evidence, made no findings on the evidence under I (c), but found solely on Mr. Weinberg's testimony that as an employee of the Receiver, he had prepared the balance sheet, and that the $30,000 closing inventory value was a liquidating value only (Tr. 99); that the correct closing inventory was not $30,000, but $80,000.00, and accordingly that there was no shrinkage of inventory, and only about $11,000 of losses in the 8¼ months' period. (Tr. 98).

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[7] The entry in Bankruptcy Schedule D-3-b was in these words: "Policies of Insurance, None."

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The court below has decided questions arising out of Sec. 14 c (7) of the Bankruptcy Act, which have not, but should be, decided by this court.

Appeals involving "explanations" under 1926 amendment have been reported in only four circuits, including ours.

2. The court below misconstrued and misapplied the proviso of Sec. 14 c (7) which provides that, once the objecting creditor has shown "there are reasonable grounds for believing" a satisfactory explanation is required under this section, "the burden of proving" the contrary "shall be upon the bankrupt."

FIRST. The opinion of the Court below, in par. 3, restates with approval the Referee's finding "that no evidence had been introduced which showed any shrinkage or decrease between the two dates," (*i.e.* December 1, 1951 and August 6, 1952, the day of bankruptcy). But Sec. 14 c (7) placed absolutely no burden on appellant-objector to produce this evidence of shrinkage under Specification I (a) beyond the mere showing that there were "reasonable grounds for believing" a shrinkage of over $50,000.00 existed. On the contrary, it did place the burden on the bankrupt "to explain satisfactorily" and disprove the shrinkage, which was not even attempted except for Mr. Weinberg's contradictory and incredible testimony.

We made the requisite *prima facie* showing by introducing the Income Tax Return for the fiscal year ending November 30, 1951, which showed an opening inventory of $80,030.38, and the "Ray Simon Optical Co. Balance Sheet" as of the day of bankruptcy, showing "Merchan-

dise Inventory (Estimated Value) $30,000.00" (Tr. 24) which Mr. Weinberg tried to explain was one-half the cost value of the merchandise, or what he termed the "liquidating value" of it (Tr. 56, 57), less $10,000 of worthless merchandise. But the tell-tale entry in the balance sheet of $3,400.00 "Cash on Hand", which was not collected by the receiver, shows conclusively that the latter never employed him to make the balance sheet, else he would have collected that $3,400.00 "Cash on Hand". Since Mr. Weinberg was not employed by the Receiver to prepare the Balance Sheet, there was no reason or excuse for his setting up a "liquidating", or any other but the correct value of the inventory. Appellant having made the requisite *prima facie* showing of "reasonable grounds for believing", and the bankrupt having failed to "explain satisfactorily", under the proviso of Sec. 14 c (7) of the Act, denial of his discharge necessarily followed. But the referee disregarded this proviso, and the courts below have approved the Referee's order, thus nullifying in the Seventh Circuit, this Section of the Bankruptcy Act.

SECOND. Par. 4 of the opinion of the court below reads in part: "Obviously it is not for us to accept such inferences" (that the bankrupt was actually the owner of the interests in Opticon standing in the name of Mrs. Simon and Mr. Silver) (Parenthesis ours). But Sec. 14 c (7) placed no burden whatever on appellant-objector to prove these inferences.[8]

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[8] Circumstances disclosed by Simon's testimony giving rise to natural inferences of his probable ownership of 5/6 interest in Opticon: (a) The fact that the $3600 interest is admitted to have been taken in the name of the bankrupt's wife, **Bartel v. Zimmerman (1920) 293 Ill. 154, 163; Reisch v. Bowie (1937) 367 Ill. 126, 132;** (b) The inference arising from the secrecy of the transaction —the false entry in the bankrupt's schedules D-3-b (Exhibit Vol.

On the contrary, the burden under the Act, was absolutely the bankrupt's to satisfactorily explain-away all detracting or derogatory inferences. Instead of so doing, however, his explanation gave rise to other more serious natural inferences under Specification I (c). *Shapiro* v. *Ornish* (D.C. Tex. 1929) 37 F. (2d) 403, 406 (last par. on page) affirmed by Circuit Court of Appeals, 5th Cir. 37 F. (2d) 407).

THIRD. Par. 5 of the Court below, reads in part: "Appellant insists that the evidence indicates that the wife of the bankrupt acquired an interest in Opticon Corporation with funds supplied by her husband . . . Unfortunately, the evidence does not justify such a postulate." But Sec.

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16)—"Policies of insurance, None" which, as a practical matter, closed the door to inquiry concerning them, **Maxwell, Trustee v. Adams (1931) 130 Me. 230; 154 Atl. 904, 906.** There was further secrecy in that the order approving the sale named only Herman Silver as the purchaser, not disclosing that the bankrupt's wife was a co-purchaser. (Tr. 5) (c) The natural inference arising from failure of the bankrupt to support his testimony, consisting largely of conclusions, by documentary evidence, such as the policies of insurance—written assignments of the same, checks evidencing the insurance loans,—the certificate of stock,—the stock subscription agreement, and corporate records, **In re Smatlak (C.C.A. 7) 99 F. (2d) 687, 690; Hubbard v. Allen (1877) 59 Ala. 283, 300;** (d) The natural inference from the fact that the ostensible owners of a 5/6 interest in Opticon, Mrs. Simon and Herman Silver the certified public accountant, were not shown to have any knowledge of the optical business while Simon the ostensible employee, was the expert. **Best v. Fuller (1900) 185 Ill. 43, 51;** (e) The inference arising from the fact that neither Mrs. Simon nor Mr. Silver were called by the bankrupt to testify, **Knetzer v. Larkin (C.C.A. 2, 1949) 178 F. (2d) 532, 534,** in which the court says: "Mrs. Larkin might have produced witnesses to corroborate her explanation . . . or could have at least explained her failure to call them." (last paragraph); **In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 261** (last sentence of opinion).

14 c (7) placed absolutely no burden on appellant to prove that Mrs. Simon held an interest in Opticon in secret trust or otherwise for the bankrupt. On the contrary, this section placed the burden on the bankrupt "to explain satisfactorily", and to disprove the natural inferences arising from the suspicious facts he related, or be denied the discharge. But instead of satisfactorily explaining, he merely disclosed a number of suspicious circumstances, which have been judicially designated "badges of fraud", each of which called desperately for further explanations which were not forth-coming. This certainly rendered his explanation under I (c) legally unsatisfactory.

FOURTH. The final sentence of the opinion reads: "If Appellant desired to pursue the inquiry further than the bankrupt's unequivocal testimony (in regard to the rights of creditors in the $52,000.00 of life insurance) it was incumbent upon it (Appellant) to plead the matter in the trial court and avail itself there of such controverting evidence as it could procure from the insurance companies or elsewhere." (Parenthesis ours). But Sec. 14 c (7) placed no burden whatever on Appellant to prove anything in regard to the rights of the bankrupt estate in the $52,000 of life insurance. That issue was not before the court. After we showed "reasonable grounds for believing" that the bankrupt had secretly used funds that should have gone into his estate, the burden shifted to the bankrupt to "explain satisfactorily" and to prove that he was not guilty, or be denied his discharge under Specification I (c).

It will be seen, therefore, that the effect of the opinion of the court below was to nullify the proviso of Sec. 14 c (7) of the Bankruptcy Act. Contrary to Congressional intent, the opinion below places the burden of proof in dis-

charge procedures back where it was prior to the amendment of 1926, *i.e.* on the objector, who usually cannot know facts, and cannot prove them. It was the intention of Congress to remedy this previously unfair situation, and to place the burden on the bankrupt, who has caused the failure, who knows the facts, and who can easily explain them.

3. The decision of the Court below is squarely in conflict with Courts of Appeal of the Second, Fifth and Ninth Circuits, upon the character of evidence required to render an explanation legally satisfactory under the Act.

FIRST. Courts of Appeal of the Second Circuit have held that an explanation based on conflicting, inconsistent and incredible statements is not satisfactory. The court in *Knetzer* v. *Larkin* (178 U.S.C.A. 2, 1949) 178 F. (2d) 532, 534, so held saying: "her (the bankrupt's) testimony is so contradictory and incredible, she failed to carry her burden of proof." To the same effect is *In re Sperling,* (C.C.A. 2, 1934) 72 F. (2d) 259, 260, 261.

Mr. Weinberg, the bankrupt's accountant, was relied on solely to make the explanation under specification I (a) which charged shrinkage of inventory from $80,030.38 on December 1st, 1951, to $30,000.00 as of the day of bankruptcy as set out in the "Ray Simon Optical Balance Sheet" of August 6. His scheme was to explain that he was employed by the receiver, Mr. Murphy, to prepare this balance sheet to show the *liquidating, instead of the actual,* value of the merchandise as of the day of bankruptcy.

But documentary evidence in the record, the entry of "Cash on Hand $3,400.00" in the balance sheet, and the absence of any cash on hand collected by the receiver conclusively shows this story to be false and wholly incredible.

Mr. Weinberg's story of being employed by the receiver to prepare this balance sheet was merely a clever device to enable him to attempt to reconcile the $80,000 figure adopted by the bankrupt as a safe and self-serving amount for the closing inventory in the partnership bankruptcy schedules,[9] and the $30,000 set up in the balance sheet which he says was one-half the cost value of salable merchandise, or the "liquidating" value.

The Court below, in approving an explanation based on incredible testimony containing inconsistencies [10] and

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[9] The fact that $80,000.00 is substantially the same as the opening figure of $80,030.38 at once arouses strong suspicion that it was adopted merely to avoid the charge of shrinkage, and is purely self-serving, especially, since no physical inventory was actually taken at the time of bankruptcy.

[10] A glaring inconsistency appears in Mr. Weinberg's formula by which he attempted to reconcile the two closing inventory figures; $80,000.00 in partnership schedules B-2-c and $30,000 set-up by him in the "Ray Simon Optical Co. Balance Sheet." He claimed that there was $10,000 of worthless merchandise in the inventory. But instead of deducting this $10,000 of worthless merchandise from the $80,000 which the bankrupt had adopted in Schedule B-2-c as the closing figure, Mr. Weinberg divided the $80,000 first by 2 (to arrive at its value in bankruptcy, since the receiver had told him "anything being liquidated does not bring the return of a going business" (Tr. 56); then he subtracted the $10,000 worthless inventory—not from the entire amount—but from the half—$40,000.00—which gave him the desired $30,000 as the figure for his balance sheet. He repeats this inconsistent, illogical and unmathematical process on p. 57 of the Transcript. Mr. Weinberg was a mathematician and an accountant. This glaring inconsistency cannot be charged to stupidity, but rather to his willingness to deceive the Court and others, knowing that they would be unlikely to analyze his formula while he was testifying.

contradictions[11] is, therefore, in hopeless conflict with the Court of Appeals in the Second Circuit.

SECOND. The judgment of the Court below in approving as satisfactory, explanations given only in the most vague and general terms, is in conflict with courts of appeal in the Second and Ninth Circuit. As holding that such explanations are not "worthy the name", see, *Federal Provision Co.* v. *Ershowsky* (C.C.A. 2, 1938) 94 F. (2d) 574, 575; *In re Sperling* (C.C.A. 2, 1934) 72 F. (2d) 259, 261, in which the court said: "We think Congress meant to require much more in the way of explanation than vague generalities." See also, *Brenner* v. *Gaunce* (C.C.A. 9, 1928) 28 F. (2d) 606.

The bankrupt's entire explanation in response to specification I (a) charging shrinkage in inventory of over $50,000, and I (b), charging losses of over $63,000 in 8¼ months, in addition to being incredible as above stated, was of such general and indefinite character as to place the

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[11] Four days before the hearing, Mr. Weinberg gave an affidavit (Tr. 22) to the effect that he had been employed by the receiver "on or about August 13, 1952" to prepare the balance sheet in question (Tr. 24). But at the hearing he contradicted his affidavit by testifying that he prepared the balance sheet "in the last week of July or the first week in August" (Tr. 57). This admission that he actually prepared the balance sheet **before** bankruptcy is no doubt correct, since this balance sheet was doubtless used to determine whether bankruptcy was the proper course. We may fairly assume, therefore, that it stated the condition of the concern as accurately as he and Mr. Simon were able to determine it.

judgment of the Court below in sharp conflict with the foregoing opinions.[12]

THIRD, the judgment of the Court below is in further conflict with the Courts of Appeal in the Second Circuit in that the explanations were not supported by documentary, or record-evidence,[13] as required by the Court in

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[12] The following taken from the Bankrupt's explanation by Mr. Weinberg on pp. 56 and 57 of the transcript, exposes the lack of definiteness condemned by the Appeals Courts of the Second and Ninth Circuits. "I **worked back** and got the physical inventory by **estimating** the gross profit rate and took **one-half** of that for a **business in bankruptcy,** and knocked off of that what I knew would be a worthless inventory" (which he had explained was **"Possibly eight or ten thousand dollars of merchandise.").**

Q. "What figures did you use to make your computation from?"

A. "I would have to look at the working papers (**which were not in court).** The closing inventory was in the **neighborhood of $80,000.00".**

Mr. Chittick: **"I object, that seems to be a guess"** (Tr. 56).

Q. "Will you tell us how you reached the valuation of $30,000.00 on the balance sheet?" . . .

A. "I got the $80,000.00 figure and **it would bring one half** of the value, **(because it was in bankruptcy)** less the depreciated stock" (Tr. 57). (Parenthesis and emphasis ours).

[13] In the case at bar the important issue under the first two amended specifications hinged entirely upon the amount of the closing inventory. If it were $30,000.00, there was certainly a shrinkage of over $50,000 and losses of over $63,000.00 in 8¼ months. If, on the other hand, the closing inventory was $80,000.00 as contended by Mr. Weinberg in spite of the $30,000.00 entry in the balance sheet, there would be no shrinkage, and the loss would be only approximately $13,000 (or $11,000 as the referee found by accepting, without proof, the $80,000 closing inventory figure). Now the only possible evidence on which the referee could make his findings that the closing inventory was $80,000.00, instead of $30,000.00, is Mr. Weinberg's incredible testimony on pp. 56 and 57 of the transcript above referred to, and the $80,000.00 entry in bankruptcy schedule B-2-c (Exhibit Volume, p. 14) which was merely a self-serving entry.

In re Sperling (C.C.A. 2, 1934) 72 F. (2d) 259, 261. That Court said: The Bankrupt "has accounted very poorly for failure to produce his books and is open to suspicion for leaving his creditors without the ordinary means of verifying the truth of even his vague explanations or definitely showing them to be false."

Mr. Simon had available a quick, easy and practical means of proving the amount of his closing inventory before the Referee if he had chosen to do so. The Receiver's Inventory and the Appraiser's Report had each been introduced in evidence. Mr. Simon could have testified from either of these documents, and could have given the cost values of merchandise turned over to the receiver. His books and bookkeeper were present in court, if he needed assistance. Thus a definite and accurate inventory readily could have been established, and the Court would have known at once what, if any, the shrinkage and losses were, and the result almost automatically would have determined the question of Mr. Simon's discharge. But he avoided this course, we may fairly assume, because it would have proved our charge of shrinkage and losses to be correct, and his discharge would then have been denied.

Again, with respect to Amended Specification I (c) calling on Mr. Simon to explain satisfactorily that none of the assets of the partnership had been used to acquire an interest in Opticon, no documentary evidence was produced by Mr. Simon to support his conclusions that he had assigned $52,000 of insurance on his life to Sadie Simon. No assignments of insurance policies, no checks evidencing the loan, nor the certificate of stock issued by Opticon, nor other corporate records, were offered.

The case at bar was, therefore, hopelessly in conflict with *In re Sperling* (C.C.A. 2, 1934) 72 F. (2d) 259, 261.

FOURTH. The Appeals Court in the Second Circuit has held that failure of the bankrupt to call as witnesses those who admittedly know important facts, renders the explanation under Sec. 14 c (7) unsatisfactory. See *Knetzer* v. *Larkin* (C.C.A. 2, 1949) 178 F. (2d) 532, 534, (next to last par.) and *In re Sperling* (C.C.A. 2 1934) 72 F. (2d) 259, 261, in which the court observed: "He (the bankrupt) could have called Solomon and the city marshal instead of basing his explanations on nothing more than his own unverified speculations". But, in the case at bar neither Herman Silver, in whose name the bankrupt's assets were purchased, nor the bankrupt's wife, were called to testify. Both must have known the facts.

FIFTH. The opinion is further in conflict with the decision in *Shapiro* v. *Ornish* in the 5th Circuit, 37 F. (2d) 407, affirming the District Court's judgment (D. C. Tex. 1939) 37 F. (2d) 403, 406, which, in the last paragraph on p. 406, defines "satisfactory explanation" under Sec. 14 c (7) of the Act, as removing all reasonable questions of doubt, so that, "he (the court) no longer wonders".

The issue thus becomes: Was the court reasonably "satisfied" with the explanation of Mr. Weinberg under specifications I (a) and I (b), and of Mr. Simon under specification I (c)? The following baffling questions demonstrate that the explanation failed to meet the test of the 5th Circuit: (1) Since the only evidence on the closing inventory shows it to have been $30,000 instead of $80,000, what became of the $50,000 of merchandise in the 8¼ months period? (2) Had it been given back as preferences to wholesalers, sold below costs, or had it been concealed by the bankrupt from the trustee and creditors of his bankrupt estate? (3) Again, with most of the scheduled debts accruing in the 8¼ months prior to bankruptcy,

and with gross sales amounting to $182,040.46 (Tr. 97) where were the cash proceeds of these sales at the time of bankruptcy? Should there not have been much more than the $3,400.00 of "cash on hand" which was concealed from the receiver? (4) If there had been no shrinkage in merchandise inventory, why did Mr. Simon not take the simple, direct method of testifying as to the cost value of the items listed in the Receiver's inventory, which would have proved beyond doubt that specifications I (a) and I (b) were, or were not, true? (5) Why did Mr. Simon fail either to admit or deny that he told Scalen he owned a 1/3 interest in Opticon? (6) If the $52,000 of insurance had been properly assigned to Sadie Simon, and if Simon himself actually had no interest in these policies or their loan values, or in Opticon purchased thereby, why did the bankrupt falsify his Schedule D-3-b, by inserting the word "None" after the inquiry "Policies of insurance"? (7) Why would Herman Silver, the certified public accountant ever invest $15,000 of his own cash in a bankrupt business which was still under the active management of the man who had caused the failure? (8) If Silver had not invested this $15,000 for himself, for whom was he holding title, if not for Mr. Simon? (9) Why were Mr. Silver and Mrs. Simon not called to testify? With the foregoing, and other lingering and perplexing unanswered questions the opinion of the court below holding the explanations satisfactory is clearly in conflict with the decision of the *In re Shapiro & Ornish* in the 5th Circuit.

The opinion below, if permitted to stand, defeats the intent of Congress in that it renders nugatory the seventh ground of objection to a bankrupt's discharge requiring a satisfactory explanation. On the contrary, as Mr. Justice Larned Hand, for the Court in *Federal Provision Co.*

v. *Ershowsky* (C.C.A. 2, 1938) 94 F. (2d) 574, 575, observed: "It would not be unduly severe to make the grant of all discharges conditioned upon such an explanation. After all, nobody is in better position to explain his losses than the bankrupt, and a discharge is a favor which ought to depend on his utmost candor and co-operation."

Wherefore Your Petitioner Respectfully Prays that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the Court of Appeals for the Seventh Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the foregoing entitled case, and that said judgment of the Court of Appeals for the Seventh Circuit may be corrected by this Honorable Court, and that your petitioner may have such other relief in the premises as to this Court may seem meet and just. And your petitioner will ever pray.

Respectfully submitted,

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